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No. 517

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA & FORT SMITH RAILWAY COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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JANUARY, 1931.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 517

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and Texarkana and Fort Smith Railway Company, appellants

v.

THE UNITED STATES OF AMERICA AND INTERSTATE Commerce Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially-constituted District Court (R. 140) has not been reported.

The report of the Interstate Commerce Commission (R. 101) is reported in 155 I. C. C. 775.

QUESTIONS PRESENTED

The following jurisdictional question is presented:

Whether, after suit to enjoin an order of the Interstate Commerce Commission under the Urgent

Deficiencies Act (c. 32, 38 Stat. 208, 220, U. S. C. Title 28, Sec. 47) has been instituted in one judicial district by certain carriers, another suit, or other suits, to enjoin the order may be instituted and contemporaneously maintained in another judicial district, or districts, by other carriers affected by the order, in view of the right given them by said Act to make themselves parties to the suit already instituted.

The ultimate question presented on the merits is:

Whether an order of the Commission requiring carriers to cease and desist from the transportation of private passenger train cars, including so-called office cars, of other carriers free, at other than published tariff rates, is invalid in so far as it forbids the transportation free by one carrier of the office car of another carrier "when occupied by its officers and employees, lawfully entitled to transportation, and traveling in the interest of or in connection with the business of such railroad."

Subordinate questions, which relate to the validity of the part of the order above described, are:

1. Whether a carrier, otherwise subject to the Interstate Commerce Act, in transporting free and without publication of tariff charges an office car of another carrier occupied by an officer or other employee of that carrier, lawfully entitled to a personal pass and engaged in his company's business, acts as a private carrier, not subject to the provisions of the Interstate Commerce Act or to the authority of the Commission under the Act.

2. Whether the Commission's finding that it is unjustly discriminatory and unduly preferential and prejudicial to transport the private passenger cars, including so-called office cars, of other carriers free while charging certain minimum fares and revenues for the movement of other privately owned or chartered cars is supported by substantial evidence.

3. Whether the Commission, in its decisions in the past, has construed the interstate commerce act as permitting one carrier subject to that act to transport free the office cars of another such carrier, when occupied as above described, and, if so, whether such construction is not plainly erroneous.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act read as follows:

> SECTION 1 (4). It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes, and just and reasonable rates, fares and charges applicable thereto and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to

establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers. (c. 91, 41 Stat. 475; U. S. C. Title 49, Sec. 1 (4).)

SECTION 6 (1). That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and

charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedule shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. (c. 3591, 34 Stat. 586; c. 91, 41 Stat. 483; U. S. C. Title 49, Sec. 6 (1).)

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges, or facilities in the trans-

portation of passengers or property, except such as are specified in such tariffs. (c. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (7).)

SECTION 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind or traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (c. 104, 24 Stat. 379; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 2.)

SECTION 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any

undue or unreasonable prejudice or disadvantage in any respect whatsoever. c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 3 (1).)

SECTION 1 (7). No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeles persons, and to such persons when transported by charitable soci[redacted]es or hospitals, and the necessary ag[redacted] employed in such transportation; to [redacted]ates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier

is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families;* nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers, subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violat-

ing this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (c. 3591, 34 Stat. 584, 585; U. S. C. Title 49, sec. 1 (7).)

Section 22 provides in part—

(1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exposition thereat. * * * Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, *or to prevent the principle officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;* * * * Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the

transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall define such section and shall specify the period during which such reduced rates are to remain in effect. (25 Stat. 855; U. S. C. Title 49, sec. 22 (1).)

STATEMENT

Appellants brought suit in the United States District Court for the Western District of Missouri, Western Division, sitting as a specially constituted three-judge court, to set aside and enjoin the following two orders of the Interstate Commerce Commission:

(1) Order entered by the Commission November 4, 1929, in No. 17757, *In the Matter of Use of Private Passenger Train Cars,* 155 I. C. C. 775, which required appellants and other carriers therein named to cease and desist "from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 11, 12.)

(2) Order made by the Commission, Division 4, July 30, 1929, amending in particulars which will be hereinafter described, the Commission's Regu-

lations to Govern the Form and Recording of Passes. (R. 13.)

The proceeding, in which the first above-described order was entered, was instituted December 7, 1925, on the Commission's own motion pursuant to authority conferred upon it by Section 13 (2) of the Interstate Commerce Act (c. 309, 36 Stat. 551; U. S. C. Title 49, sec. 13 (2)). A questionnaire was sent to all Class I[1] and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The salient facts are that carriers transported free of charge the private, or office, cars of other carriers when occupied by perons, for whose transportation the law permits a pass to be issued, such as the officials and employees of other carriers, and their families; that they performed incidental, or accessorial, transportation free of charge, when the cars were not so occupied, as for example, in moving the cars "deadhead"[2] to stations where they

[1] Class I: Annual operating revenues above $1,000,000. In 1925 Class I carriers operated about 91 per cent of the railroad mileage of the United States.

[2] "Not occupied, except in some instances by an attendant." (R. 107.)

were to be occupied, in returning them "deadhead" to their home stations after occupancy, or in switching and storing the cars when awaiting occupancy (R. 107, 105, 106); and that the owning roads, or occupying pass holders, retained dominion over such private or office cars, when moving, or held, on foreign roads, for their own particular use,[3] and the foreign roads were not at liberty to make other use of the cars (R. 115; Br. 12). The further fact should here be mentioned that the carriers published and exacted certain minimum fares and surcharges (usually 25) for the transportation of other privately owned, or chartered, cars, which were the same whether a car was occupied by 1 or 25 passengers. (R. 113, 114, 118.)

On July 23, 1928, a proposed report was served upon appellants and all other carriers (R. 3) which reached the conclusion and finding that the practice of transporting free or at other than published tariff rates the private, or office, cars of other carriers was contrary to the provisions of the Interstate Commerce Act, and that it resulted in unjust discrimination and the according of undue preference. Subsequently the carriers named in the Commission's order of November 4, 1929, "appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had." (R. 11.) On June 21, 1929, the Commission issued its report in the proceeding, wherein

[3] Ticket passengers sometimes occupy the cars, but only on invitation of the occupying pass holder. (R. 115.)

it adopted the conclusion and findings recommended in the proposed report. The carriers were admonished that they would "be expected to cease and desist from the violations of the Act herein found" (R. 101 to 120), but no order was entered at that time. The order issued in the proceeding, namely, the above-described order of November 4, 1929, was entered after the carriers, against whom it is directed, had "waived any further or additional hearing before the Commission to that which had been given prior to said order." (R. 100, 12.) In preliminary recitals contained in the order the findings made in the Commission's report (R. 118, 119, 120) were condensed to read as follows:

> 1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;
>
> 2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and
>
> 3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with or-

> dinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial. (R. 12.)

The other order here involved, namely, that made July 30, 1929, "by the Commission, Division 4," (R. 13) amending the Commission's Regulations to Govern the Forms and Recording of Passes is not an order entered in the *Private Car case*. Its making, however, was induced by contentions advanced in that proceeding to the effect that the form of pass prescribed by the then regulations, which included the word "car," covered foreign-line cars as well as home-line cars. (R. 116.) The Commission pointed out reasons why such interpretation could not properly be attributed to its form of pass, but, in order to remove the matter beyond dispute, it added by its amendment the express statement that "a car pass may be issued only for cars owned by the issuing carier or held by it under lease" and that "it may not be issued for other cars."

Prior to the filing of the petition herein involved and on, to wit, the 14th day of December, 1930, the Louisville & Nashville Railroad Company, and four other independent carriers, suing on behalf of themselves and of all other carriers which might have an interest in the premises, filed a petition in the United States District Court for the Western District of Kentucky, to enjoin the above-described orders of the Commission in so far as they pro-

hibited the petitioners and other carriers from transporting free of charge the private or so-called office cars of other carriers, when occupied by a person or persons lawfully using free transportation over the lines of the moving road. Decision in that case was rendered on May 28, 1930, and was called to the attention of the lower court in the instant suit. (R. 74 to 83.)

While the *Kentucky case* was pending, and on, to wit, February 7, 1930, appellants, suing on their own behalf only, filed their petition, asking for relief which was covered by the relief asked for in the *Kentucky case*, namely, for the enjoining of the Commission's orders in so far as they prohibited free transportation of the *office cars* of other carriers, when occupied by officers or employees, lawfully entitled to free transportation and engaged in business of their companies. (R. 10.) The case was argued and submitted as on final hearing on the application for permanent injunction. August 27, 1930, the court rendered its opinion upon final hearing. (R. 140.) September 19, 1930, final decree was entered dismissing the petition for want of equity. (R. 84.)

SUMMARY OF ARGUMENT

I. The Urgent Deficiencies Act, which provides for specially constituted courts of three judges, expedited procedure and direct appeals to the Supreme Court, does not authorize parties, seeking

the same or substantially the same relief from a Commission order, to bring successive suits in different judicial courts to enjoin the order.

II. The transportation free, and without published tariff charge by one carrier subject to the Interstate Commerce Act, of the office car of another such carrier, occupied by an officer or employee, entitled to a personal pass, and engaged in his company's business, is not private transportation outside the provisions of said act and the jurisdiction of the Commission.

1. Appellants' contention that, in transporting the office cars of other carriers they do not act as common carriers subject to the Act because they perform the transportation free and without publication of traiff charges, is in effect a contention that, by their very violation of the Act in performing certain transportation, they make themselves private carriers not subject to the Act as to that transportation and free to continue the violation.

2. The exception in the Act permitting issuance of passes for free transportation of specified individuals must be construed with due regard to its manifest purpose and when so construed it does not permit of free transportation of a private or office car along with the individual.

3. Appellants' practice can not be likened to intercarrier contracts for trackage rights, or for detour movements and return of astray shipments of propety of the general public in course of trans-

portation—it is intercarrier only in the sense that it is the giving of free transportation service by one carrier to another or to the latter's official.

III. The principal of statutory construction whereunder the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, which appellants have invoked in defense of their practice, is inapplicable because the language of the statute is plain and unambiguous and because the Commission has not given to the statute the interpretation contended for by appellants.

ARGUMENT

I. THE URGENT DEFICIENCIES ACT DOES NOT AUTHORIZE PARTIES, SEEKING THE SAME OR SUBSTANTIALLY THE SAME, RELIEF FROM A COMMISSION ORDER, TO BRING SUCCESSIVE SUITS IN DIFFERENT JUDICIAL DISTRICTS TO ENJOIN THE ORDER

As heretofore said, prior to the institution of this suit to enjoin the above-described orders of the Commission the Louisville & Nashville Railroad Company and four other railroads brought suit under the Urgent Deficiencies Act (c. 32, 38 Stat. 208, 220; U. S. C. Title 28, sec. 47) to enjoin the same orders in the United States District Court for the Western District of Kentucky, in which suit the relief asked for included the relief which is here sought by appellants. Decision was ren-

dered in that case before the instant case was heard, and was brought to the lower court's attention by amendment to the Commission's answer. (R. 74, 75.) Appellants could have exercised their right to be made parties to the original suit and could therein have presented their contentions along with those of the other railroads. A single adjudication as to the validity or invalidity of the orders, upon any ground alleged, could have been obtained.

The jurisdiction involved in both cases grows out of the Commerce Court Act (c. 309, 36 Stat. 1146; U. S. C. Title 28, sec. 41 (27)). That Act created the Commerce Court and conferred upon it, among other things,[4] jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act transferred that jurisdiction of the Commerce Court to the several district courts of the United States. It provides for specially-constituted courts of three judges "of whom at least one shall be a circuit judge" to hear and determine said cases. Applications for permanent injunction, for preliminary injunction, and for temporary stays must all be acted upon by the three judges. The cases are expedited and direct appeal lies to this court.

The venue provisions read as follows:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or

[4] To enforce Commission orders, and certain other cases arising under I. C. Act.

> in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

In view of the facts that Commission orders are often made upon petition of numerous parties, that they are often made in proceedings instituted upon its own motion "and not upon the petition of any party," and that they often cover a wide territorial scope, it is clear that many cases, like the instant one, afford a broad election of venue. But, heretofore, when such situations have existed either independent suits have been instituted in the same district and consolidated for hearing and decision, or, more often, one suit has been instituted and other parties affected by the order have inter-

vened.[5] Frequently intervenors in such suits present to the courts views of the law different and even inconsistent with those of the party bringing the suit. That the Act contemplates that, once the jurisdiction of a court of proper venue, has been invoked by a party having standing, other parties seeking the same relief must appear before the same tribunal is shown by the fact that it expressly adopted the procedure of the Commerce Court (c. 32, 38 Stat. 220; U. S. C., Supp. II, Title 28, sec. 44), which was conceived with a view to caring for the many rights and interests that may be affected by a Commission order in a single suit to test the validity of the order. Section 212 of the Commerce Court Act reads:

> The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, * * * *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto *of their own motion* and *as of*

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[5] *Assigned Car Cases*, 274 U. S. 564 (93 I. C. C. 701); *United States* v. *Anchor Coal Co.* (*Lake Cargo Coal Cases*), 279 U. S. 812 (25 F. (2d) 462); *Beaumont, Sour Lake & W. Ry. et al.*, v. *United States* (*Southwestern-Western Divisions Case*), decided Nov. 24, 1930 (36 F. (2d) 789); *A. T. & S. F. Ry.* v. *United States* (*Export Grain Case*), 279 U. S. 768 (33 F. (2d) 345); *T. & P. Ry.* v. *United States* (*Gulf Ports Preference Case*), U. S. Dist. Ct. Southern Dist. Tex., Galveston Division, decided June 16, 1930 (160 I. C. C. 345).

> *right,* and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, * * * may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of *such party or intervenor* aforesaid, but said intervenor or intervenors *may prosecute,* defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein. (U. S. C., Supp. II, Title 28, sec. 45a.) (Italic ours.)

The right so given to parties in interest to a Commission proceeding to appear in any suit involving the Commission's order is something more than the usual right of intervenors. It is that they "may appear as parties thereto *on their own motion,* and *as of right* and be represented by their counsel." If they have such standing as would

entitle them to maintain a separate suit in another judicial district, it can not be doubted but that they could press to a conclusion any suit in which they had intervened, or appeared *as of right,* regardless of the action or nonaction of the plaintiff named in the original bill; (compare *Sprunt & Son* v. *United States,* 281 U. S. 249) for such right is expressly given them even in a suit instituted by the Attorney General, as, for example, one to enforce an order of the Commission. In short, the Urgent Deficiencies Act must be interpreted in light of the fact that the jurisdiction and procedure (except as supplemented) thereunder was once that of a single court whose machinery was especially adopted to afford in a single suit opportunity of hearing upon legal questions to the many interests affected by a Commission order. The Commerce Court Act was named an amendment to the Act to Regulate Commerce and "was intended to be but a part of the existing system for the regulation of interstate commerce" (*Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 294, 295), and, therefore, the provisions of the Urgent Deficiencies Act must be construed harmoniously with the whole scheme of regulation. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 441, 442; *Harriman* v. *Interstate Com. Comm.,* 211 U. S. 407, 419, 420; *Procter & Gamble Case, supra.*

Congress transferred the jurisdiction of the Commerce Court to the many District Courts, but,

since it at the same time adopted that court's procedure conceived with a view to enable all parties in interest to appear in a single suit and to enable the court to consider their rights and views in a single suit, it is apparent that it was not its purpose that those rights and views should be separately considered and determined by different courts, or even by the same court in independent and later suits. The supplemental procedural provisions added by the Urgent Deficiencies Act for three-judge courts, expedition and direct appeal only lend greater force to this view, in that they show that it was Congress' intention to provide for a single special tribunal in each case, which would consider all questions, and for a special procedure whereunder prompt and final disposition thereof would be made in the public interest.

Of course there are Commission orders which are clearly severable into parts for purpose of separate injunction suits, but here the relief asked for in the second suit is included in the relief asked for in the first suit. If, after a suit has been filed in one district by a party, a second suit may be filed in another district, by another party in interest, and, if after decision by the one specially constituted court, the second suit may be pressed for hearing and decision before another specially constituted court, of course it would follow that there is authority under the Act for still other such suits, further burdening the courts and delaying

administrative relief granted by the Commission. When consideration is given to this, the purpose of Congress to authorize a single suit, similarly as under Commerce Court Act, is clear.

II. THE TRANSPORTATION FREE, AND WITHOUT PUBLISHED TARIFF CHARGE BY ONE CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT OF THE OFFICE CAR OF ANOTHER SUCH CARRIER, OCCUPIED BY AN OFFICER OR EMPLOYEE, ENTITLED TO A PERSONAL PASS, AND ENGAGED IN HIS COMPANY'S BUSINESS, IS NOT PRIVATE TRANSPORTATION OUTSIDE THE PROVISIONS OF SAID ACT AND THE JURISDICTION OF THE COMMISSION

Assembling in summarized form the provisions of the Interstate Commerce Act here involved: Section 1 (4) makes it the duty of carriers subject to the Act to furnish transportation upon reasonable request therefor and to establish just and reasonable rates, fares, and charges. Section 6 requires the carriers to file and publish all rates or charges for transportation between points on their own lines and between points on their own lines and points on the lines of other carriers. It forbids a carrier from transporting property or passengers unless the rates or charges upon which same are transported have been filed and published; from charging any different compensation than that specified in the published tariffs and from extending to any shipper or *person* any privileges or facilites except such as are specified in its tariffs. Section 2 forbids any unjust discrimination in charges for transportation of property or persons under

substantially similar circumstances and conditions. Section 3 forbids the giving of any undue preference or advantage to any person or corporation or any particular description of traffic in any respect whatsoever. The only exceptions in any way qualifying the above requirements and prohibitions are: (1) As to property, section 22 contains an exception, which permits transportation free or at reduced rates for the United States, for the States and Municipalities and for certain charitable purposes; and (2) as to persons, section 22 and paragraph (7) of section 1 contain exceptions to the prohibitions against "free passes" or "free tickets," which permit the carriers to grant passes for certain charitable purposes and for certain other named purposes, with which we are not here concerned, and permit them to grant passes to their own officials, employees and their families *and to interchange passes for the officers, agents, and employees of common carriers, and their families.*

Appellants admit that, prior to the Commission's decision herein involved, it was their practice to transport the office car of another carrier free of charge and without publication of tariff charge for its transportation, when occupied by an officer or employee, lawfully entitled to free transportation, and engaged in company business. Moreover, if an official of the owning carrier made a stop at a business center, it is clear that the car had to be either switched and held on the foreign line (as the office of the owning carrier's official) or returned to its

home line. (R. 5.) If it was returned to its home line, it had to be transported back to the pass holder for his return trip. (R. 107.) In justification of their practice, they state that a railroad official must occasionally travel on business to points on other carriers' lines and must have with him "correspondence, office files, blue prints, etc." (Br. 9 to 11; R. 4, 6.)

Obviously, application of the Act's prohibitions against transporting property without tariff charges on file, against extending to any person any privileges or facilities except as specified in published tariffs, against unjust discriminations, and against the giving of any undue preference "in any respect whatsoever," can not be lawfully made to depend upon ownership of the property transported, or upon the individual or corporation, for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole was to do away with discriminations based on any such distinctions. *Houston, etc., Ry.* v. *United States*, 234 U. S. 342, 356. The Act makes no exceptions permitting carriers to favor other carriers in the transportation of property (*Int. Comm. Com.* v. *B. & O. R. Co.*, 225 U. S. 326), and the exception permitting interchange of passes for officials and employees of common carriers clearly can not be construed to allow of the free transportation of a whole private car as well as the person of a passholder. Such construction would be contrary to the manifest purpose of the

exception. *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule that exceptions from a policy embodied in a statute must be strictly construed. *Spokane & Inland R. Co.* v. *United States*, 241 U. S. 344, 350. It would, in fact, add to the Act and entirely new exception. *L. & N. R. Co.* v. *Motley*, 219 U. S. 467, 479.

Before passing to appellants' legal contentions, the court's attention is called to the fact that while appellants technically base their standing to maintain this suit on the allegation that the Commission's orders will deprive them "of the right to make a lawful use of their properties * * * and consequently to deprive them of their properties without due process of law" contrary to the Fifth Constitutional Amendment (R. 9, 10), the body of their petition (R. 4, 5) and much of their argument shows that their only grievance of substance is that other carriers are no longer free (if they choose so to do) to transport appellants' cars without charge. Since the requirement in the Commission's order is that appellants desist from transporting the office cars of other carriers without compensation, it is difficult to construe it as a taking of their property without due compensation. Appellants, of course, have no legal right to have other carriers transport their office cars free, which could be asserted as giving them standing to maintain this suit.

Appellants have construed the comment of the Commission, that business reasons may in some cases justify the movement of an office car off home lines (R. 108), as meaning that such movement might be justified in some cases free of charge. What is pointed out by the Commission is that, while the use of a private car equipped with profiles, maps, blue prints, and company records is warranted on home lines, it is seldom necessary on trips for business reasons off home lines. The Commission's order, of course, does not prevent the use of an office car on foreign lines provided a charge for the transportation is published and collected.

1. A common carrier subject to the act can not make of itself a private carrier as to particular transportation by its failure to comply with the terms of the act in conducting that transportation

Giving separate consideration to section 6 of the Act, paragraph (1) thereof requires the carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of other carriers. Because of its importance, paragraph (7) of said section is again set forth in full, and reads as follows:

> No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are trans-

> ported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

In short, a carrier is forbidden to transport property unless the charge for its transportation has been filed and published. It can not charge or receive a greater or less or different compensation than that specified in its tariff rates, directly or by any indirect means. It is forbidden to extend to any shipper or *person* any privilege or facility in the transportation of passengers or property except such as are specified in its tariffs.

The violations of section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation and extended to persons privileges or facilities not named in their tariffs. Those violations are of the provisions of the Act itself, which surely must be

as strictly observed as tariffs filed in furtherance of said provisions. If the transportation of office cars here involved were for noncarrier corporations, or for persons not traveling on passes, it may be assumed that appellants would not contend that, by neglecting to publish charges therefor, they would become privileged to perform the transportation free of charge.

In *Legality of Express Franks*, 50 I. C. C. 599, it was said at page 603:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. See sections 2, 3, and 6. * * * Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, this court said at pages 478 and 479:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions *of existing contracts,* it forbade by broad, explicit words *any* carrier to charge, de-

> mand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

As heretofore shown, the Act's only exceptions permitting of free transportation of property are confined to transportation of property for certain governmental and charitable purposes. Appellants do not contend that the transportation of private cars of other carriers falls within any of those exceptions.

Moreover, appellants admit that "Office cars constitute no part of the transporting carrier's passenger equipment and are not available for use by passengers generally" (Br. 12), which admission is in sharp contrast with the position taken by appellants in the companion case (*Louisville & Nashville R. R.* v. *United States,* No. 333) that the private or office car of one carrier on the line of another is not property subject to transportation charges when occupied by a person entitled to free transportation, because under such circumstances it becomes the transporting carrier's facility of transportation. By thus conceding that an office car on another carrier's line is no part of the transporting carrier's equipment appellants recognize what is clearly true, namely, it is transported by

the foreign line as the property of another and for his benefit.[6]

At the same time appellants do not dispute the fact that rolling equipment of every kind is subject to transportation charges under section 6 of the Act when transported as the property of another carrier and for its benefit. Appellants' tariffs give recognition to this, in that they name charges on all kinds of cars transported on their own wheels. They apply on new cars moving from the shops, on movements to and from off-line repair shops and on any other movements over foreign lines not in regular service.[7] (Br. 13; R. 112.) Furthermore, appellants do not dispute the fact that private cars of individuals or corporations are similarly recognized by them as "property" subject to transportation charges. (Br. 45.) For privately-owned or chartered cars the tariffs name a fixed number of fares and of surcharges (usually 25) and they also call for a minimum flat charge. (R. 113.) That these charges cover the service of transporting the car "is apparent from

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[6] The foreign line is not at liberty to make use of the car for its own purposes. Ticket passengers sometimes occupy it but only on invitation of the pass holder. (R. 115; Br. 12.)

[7] Freight and passenger cars, moving in interchange service under revenue-producing load, are not subject to transportation charges. The distinction is that they move under through rates (joint or combination) and they are made the foreign line's equipment by payment of a sum called a "per diem" or other form of rental. (R. 112.)

the fact that they are the same, whether the car is occupied by 1 passenger or 25." (R. 118.)

And yet appellants assert that the office car of one carrier transported by another is not subject to the requirements of section 6 as to publication and observance of tariff charges, provided that it is occupied by an officer or employee traveling on a personal pass and engaged in company business. Their contention is that such transportation is private transportation, not subject to the Act, and that in performing such transportation a common carrier otherwise subject to the Act, is a private carrier not subject to the Act. Since, however, they concede that cars transported for another carrier are subject to transportation charges, that privately-owned or chartered cars are subject to transportation charges, and that the office cars of railroads on a foreign line are transported, not as the transporting carrier's equipment, but for the owning line's benefit, the distinction, which makes the transportation of office cars private transportation not subject to the Act, narrows down to the failure to observe the requirements of section 6 to publish and collect tariff charges. And such is, in fact, their position. They assert that, because they have never named charges in their tariffs on office cars of other carriers, but instead have transported them free and without publication of charges, when occupied by an official, entitled to free transportation and traveling on company business—reserving,

however, "the right to grant or refuse the movement"—they have not held themselves out as common carriers of the office cars of other carriers; that the transportation so conducted is private transportation not subject to the Act; and that they, in performing it, are private carriers not subject to the Act.

But a carrier subject to the Act can not make of itself a carrier not subject to the Act as to particular transportation by violating the Act in its method of conducting such transportation. Section 6 forbids the transportation of property or passengers unless the charges for the transportation have been filed and published. The evil of preferences and discriminations was the principal thing aimed at by the Act to Regulate Commerce. *Houston, etc., Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342, 356; *Kansas City Ry. Co.* v. *Albers Comm. Co.*, 233 U. S. 573, 597; *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 344, 350. And in *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, this court said (p. 442) that the amendments made by section 2 of the Hepburn Act of 1906 (c. 3591, 34 Stat. 586) to section 6 of the Act to Regulate Commerce show that Congress had come to believe

> that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be

> not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times.

Distinctions in transportation service or charges, based on the person or corporation for whom the service is performed, is the very essence of discrimination and preference under the Act. Appellants' asserted right to transport free, and without publication of tariff charges for the movement, the office cars of other carriers occupied by officials traveling on their company's business, clearly rests on a distinction of that character.

The case of *New Haven R. R.* v. *Int. Com. Com.*, 200 U. S. 361, shows that the fact that transportation service is performed by one carrier for another does not remove it from the requirements of section 6. In that case there was involved a contract of the Chesapeake & Ohio with the New Haven, whereunder the former purchased coal in West Virginia and delivered the same to the New Haven at a price, which it was shown did not cover the cost of purchase and published freight rates. The decision by this court sustained the Commission's contention that the tranaction effected a departure from published rates.

In *Int. Com. Com.* v. *B. & O. R. Co.*, 225 U. S. 326, involving transportation by one carrier of fuel coal for another carrier, this court held that a railroad can not be made a favored shipper and given lower rates than other persons.

The transportation by one carrier of fuel coal for another carrier is transportation essential to its business quite as much as is transportation of its office car. In light of the above cases it is apparent that the carriers could not, by excluding from their tariffs "fuel coal when transported for other carriers for use in their necessary business" make such transportation private transportation not subject to the Act and themselves private carriers as to such transportation. Nor would it make any difference, if it was their practice to perform such transportation free upon the request of other carriers, with reservation of the right to grant or refuse each request as made.*

Appellants assert that the lower court erred in holding that office cars of carriers occupied by an official traveling on a pass and engaged in company business, were covered by those provisions in their tariffs which name minimum charges on privately owned or chartered cars. (Br. 44.) The decision of the lower court does not appear to be that car-

* Appellants cite many cases to support their position. Of those dealing with carriers subject to the I. C. Act, the important ones are discussed and clearly distinguished in the lower court's decision. It should be mentioned, however, in connection with these cases that the prohibition in section 6(7) of the Act against transportation of property unless the charges for its transportation had been published was added by the Hepburn Act of 1906. *Interstate Commerce Act, Annotated*, Vol. 2, p. 1472. The decision in *C. M. & St. P. Ry.* v. *Grant Bros.*, 68 Fed. 506, involving the special contract to transport the train of a circus company was rendered in 1895.

rier-owned private, or office cars are covered by the tariffs, but that, since the carriers hold themselves out by their tariffs to carry like cars for all others, they can not claim to be private carriers in performing the same transportation for a selected class. The fact that appellants' cars contain their private business records does not distinguish them from the private or chartered car of an individual, or an official of a corporation, who is likewise traveling on business; nor do such contents materially distinguish their cars from the private cars of individuals who are traveling for other than business purposes. The Commission report states that "apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." (R. 118.) Appellants are not controverting statements of fact in the Commission's report.

Moreover, in light of the prohibition in section 6 against transporting property unless the charges for its transportation have been published, and of the decisions in *Southern Ry.* v. *Reid, supra, New Haven R. R.* v. *Int. Com. Com., supra*, and *Int. Com. Com.* v. *B. & O. R. R., supra*, it seems clear that, even if appellants' published tariffs did not name charges for transportation of the private cars of individuals and corporations, they could not lawfully transport free, and without publication of tariff charges the "offices on wheels" of other carriers. Carriers subject to the Act can not, by their

very violation of the Act in performing certain transportation, make themselves private carriers not subject to the Act as to that transportation and free to continue the violation.

2. The exception in the act permitting issuance of passes for free transportation of specified individuals must be construed "with due regard to its manifest purpose" and, when so construed, it does not permit of free transportation of a private or office car along with the individual.

The decisions cited in the above chapter show that transportation for another carrier stands on the same footing under the Act as any other transportation and that the failure of a carrier subject to the Act to comply with the requirements of the Act as to the publication and collection of tariff charges can not operate to remove the transportation, or the carrier, from the Act's jurisdiction. Appellants are not apparently specifically relying upon the exceptions from the prohibition against "free passes" and "free tickets," which permit of passes for free transportation of officers of carriers and other specified individuals to show that the free transportation of a private or office car is also permitted. For this reason and for the reason that the scope properly attributable to those exceptions has been fully discussed in the companion case (*Louisville & Nashville R. R. v. United States*, No. 333) it will be here dealt with very briefly.

The above-mentioned exceptions clearly relate to persons, since the permission given is to inter-

change passes for the officials and employees of common carriers and their families. The only exceptions in the Act relating to property are those which permit of transportation free or at reduced rates for the federal and local governments and for specified charitable purposes. In *American Express Co.* v. *United States*, 212 U. S. 522, involving the question as to whether the exception permitting issuance of passes for the officers and employees of carriers made lawful the issuance of franks by express companies for free transportation of property, this court said:

> We are clearly of the opinion that, *without doing violence to the language used in section 1—including the proviso*—its terms cannot be held to include the transportation of goods. (Italics ours.)

Just as said proviso or exception can not be held to include free transportation of goods, so likewise it can not be held to include free transportation of property in the form of a private car. Clearly a provision, which permits of free transportation of specified persons can not be construed to permit of free transportation of a private car as well. Any such interpretation would be contrary to the manifest purpose of the exception. *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule that exceptions from a policy embodied in an Act must be narrowly construed. *Spokane & Inland Empire R. R.* v. *United States*, 241 U. S. 344, 350. It

would, in fact, add to the Act an entirely new exception. In *L. & N. R. R.* v. *Mottley*, 219 U. S. 467, this court, after commenting upon the fact that Congress had manifestly considered the question as to what exceptions should be made as to free passes and free transportation, said at page 479:

> The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

3. Appellants' practice can not be likened to intercarrier contracts for trackage rights, or for detour movements and return of astray shipments of property of the general public in course of transportation—it is intercarrier only in the sense that it is the giving of free transportation service by one carrier to another or to the latter's official

Appellants argue that the practice of transporting free the office cars of other carriers when the occupying officials are engaged on their company's business can not in law be discriminatory, because it is an intercarrier matter "in which no member of the traveling or shipping public is concerned, and in which no public interest is affected." In answer, it should be first said that there can be no abstract proposition that because contracts or arrangements are made between carriers, no unlawfulness under the Act can result, either in the form of prejudice to the traveling or shipping public, or in other form affecting the public interest. Moreover, there is no similarity between the instant practice of the carriers and the examples of intercarriers contracts relied upon by appellants.

The examples most stressed are intercarrier contracts for trackage rights, whereby one carrier secures the right to operate its trains over the tracks of another, for return of "astray shipments" and for detour movements of the trains of one carrier over the tracks of another when the tracks of the former are undergoing repairs. These intercarrier contracts are in respect of transportation being performed for the general public, whereas the matter under consideration is transportation being performed for another carrier, or for its official.

Moreover, appellants' argument under this head necessarily conflicts with reasoning, which they have advanced to show that a carrier, in transporting free the office car of another acts in the capacity of a private carrier not subject to the Act. In support thereof they stated that the transporting carrier assumed no obligation in advance to transport cars free of charge. "The right to grant or refuse the movement is always reserved." (Br. 12.) So that, there is no contract by one carrier to carry free the cars of another based on the consideration that that other will carry its cars free of charge. Mutuality of consideration is at most a mere hope—each movement of a private, or office, car stands by itself, and each is performed free of charge. In any event if there were consideration of such character it would make no difference. As said by the Commission:

> Reciprocity between carriers is no justification for the free transportation of pri-

> vate cars. It will be observed that railway equipment generally which is not in revenue service is not handled on that principle, and it could not be so handled lawfully. Moreover, the returns to our questionnaire show that there is seldom a fair balance between the service performed by different carriers in transporting the private cars of each other. On the contrary, the returns show that there is often a wide difference in the relative amount of service performed in hauling such cars. No one has contended that the theory of reciprocity warrants the free handling of private cars. Transportation must be paid for in cash and not in commodities or services. *In re Contracts for Free Transportation*, 16 I. C. C. 246; *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 270. (R. 118.)

Appellants admit that an office car on a foreign line is no part of the transporting carrier's equipment (Br. 12) and their argument under their principal contention rests on the premise that the transportation by one carrier of the office car of another, moving on business of the latter, is transportation for the owning carrier or for its official, although of private character and performed by the transporting carrier in a private capacity not subject to the Act. If such transportation is an inter-carrier matter of such character that the provisions of the Act are not applicable thereto, why do appellants and other carriers publish charges

for all kinds of railway equipment, when transported for the sole benefit of the owning carrier?

The decisions in *New Haven R. R.* v. *United States*, 200 U. S. 361, and in *Int. Com. Com.* v. *B. & O. R. R.*, 225 U. S. 326, which show respectively that the transportation of fuel coal for another railroad is subject to section 6 and that the transportation of fuel coal for another railroad at reduced rates subjects other shippers to undue prejudice, in violation of section 3 have been above mentioned. Transportation of fuel coal for a carrier is quite as essential to its business as is transportation of its office car occupied by an official engaged in its business. Both might be termed inter-carrier matters, but that fact does not remove the transportation from the operation of the Act's provision or from the jurisdiction of the Commission thereunder.

4. The commission's administrative findings of unjust discrimination and undue preference under sections 2 and 3 of the act are supported by substantial evidence

Coming, now, to the Commission's findings of unjust discrimination and undue preference and prejudice in violation of sections 2 and 3 of the Act appellants' brief reads (page 62):

> The sole ground on which the Commission and the lower court predicated the finding of unjust discrimination and undue preference and prejudice was the fact that the office car movements in the past have been free,

> whereas the movements of special privately owned, or chartered cars have been at tariff rates. This fact, says the lower court, "is alone sufficient evidence of discrimination." (R. 144.)

Appellants contend, in substance, that there can be no unjust discrimination in law as between carriers which obtain free transportation of their office cars when occupied by officials engaged in company business and the general public, which must pay the tariff charges for like service, because no competitive commercial relationship exists between the carriers who are given the preference and the general public, which is subjected to the prejudice.

In connection with this contention it must be kept in mind that transportation of a private car, whether, on the one hand, transported for a carrier, or for its official, or some other individual entitled to a personal pass, or, on the other hand, transported for some member of the traveling public, is transportation in respect of passenger travel. A private car is not an industrial product at the moment under transportation to market in commercial competition. It is property already marketed and in use and its transportation for the owner or user can be likened to the transportation free for a passenger of excess baggage, or of articles which under the tariffs can not be checked as baggage, such as bicycles or automobiles. (R. 111.) The kind of service here involved, and the character of the pref-

erence given to a railroad or its official, or other passholder, by appellants' practice will be made clear by considering a supposititious case in respect of private cars on which the tariffs name charges. Assuming, for example, that appellants' tariff charges on privately owned or chartered cars, in addition to excluding (or failing to include) carrier-owned private cars, expressly excluded the privately owned or chartered cars of all lawyers, could it be said that a lawyer traveling for recreation in a chartered car was not given a preference over paying passengers covered by the tariffs, if the railroads performed the transportation on a single passenger ticket? In the event that he was traveling on business of an employing firm of such kind as necessitated his having with him voluminous records and a stenographer, could it be said that his employer was not given a preference, if the railroads transported the car and the two employees on two passenger tickets?

Appellants' construction of sections 2 and 3 of the Act to require that, before the Commission can find discrimination to be unjust or undue a competitive commercial relationship must exist between the parties given a preference and the parties subjected to prejudice, would make their provisions unworkable in respect of passenger train service. Many passenger trains run daily between the cities and towns of the country carrying passengers traveling for recreation purposes of many

kinds, for educational purposes of many kinds, for business purposes of many kinds (sometimes their own but more often an employer's) and for many other purposes. All such passengers are clearly entitled under the Act to equality of service for the same charges and to equality of charges for the same service without inquiry by the Commission into the particular purpose of the travel of each.[9]

In *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, involving the validity of an order entered by the Commission for the purpose of removing discrimination against interstate commerce caused by the lower level of intrastate fares this court said at page 579:

> We have two questions to decide.
>
> First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?
>
> Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?
>
> We shall consider these in their order.
>
> First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston, East & West*

[9] Persons traveling at party rates, commutation rates, or excursion rates are in a different class from ordinary passengers for reasons which justify the differentiation from a transportation standpoint.

> *Texas Ry. Co.* v. *United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. * * * [10]

In view of the broad general class of passengers traveling in interstate and intrastate commerce, it is clear that this statement could not have been made if it were true that, before the Commission can find unjust discrimination in respect of passenger travel, it must inquire into the varied purposes of travel of the passengers to determine whether, as between each and all of those given a preference and each and all of those subjected to prejudice, there exists competitive commercial grounds upon which to base a finding that the discrimination is unjust and undue.

III. NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS WHEN OCCUPIED BY A PASSHOLDER

The final ground asserted by appellants against the validity of the Commission's order is that the Commission has in the past sanctioned the practice of the carriers in moving free the office cars of another carrier, and that Congress has impliedly ratified and recognized such practice as lawful. In support appellants claim that the practice has

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[10] The validity of the order as a whole was sustained on the second ground, namely, that the low level of intrastate fares cast a burden on interstate commerce in that they did not yield their fair share of the revenue necessary to maintain an efficient transportation service.

always existed as the Commission and Congress have well known.

Having in mind the extensive duties of the Commission, the vast volume of records on file with it, and the varied provisions of the Act, it is clear that it can never be said to have sanctioned any particular interpretation of the statute unless such interpretation was squarely in issue before it for decision. As lending emphasis to this, the court's attention is called to the very different grounds asserted in this and its companion case as rendering the practice lawful, and to the fact that, whereas in *Louisville & Nashville R. R.* v. *United States*, No. 333, appellants are asserting that transportation free of private cars for all individuals entitled to passes is lawful, here appellants contend that transportation of office cars only is lawful. *Whether they are contending that the Commission has sanctioned the whole practice, or only that part which they regard as lawful, is not made clear.*

Appellants point to the Commission's conference rulings, which prescribe a form of pass reading as follows:

> Pass John Smith, President, car, and five officers and employees of the X Y Z Ry. Co.

The Commission has abandoned the practice of making conference rulings. They were not its decisions in a proceeding, wherein it would have had the benefit of a record and the views of opposing counsel. They were rescinded *in toto* December 26, 1928.

Appellants also point to the Commission's Regulations to Govern the Form and Recording of Passes which, in the 1917 issue, prescribed a form of pass substantially following that prescribed in its conference rulings. In prescribing said Regulations to Govern the Form and Recording of Passes, the Commission likewise acted informally and ex parte in that its action was pursuant to section 20,[1] paragraph (5) whereof gives the Commission the following authority:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.
> • • •

Referring to this contention of appellants the Commission's report reads:

> In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the

[1] The order of July 30, 1929, which is attacked in the petition as well as the order of November 4, 1929, is not, as alleged in the petition, an order within the meaning of section 16 (8) of the Act. Section 20 carries its own penalties, but they are for keeping different records than those prescribed by the Commission or for falsifying records. (34 Stat. 594.)

> the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars, or both. It might, in fact, be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly, we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars. (R. 115, 116.)

Prior to the proceeding herein involved the practice of transporting free the private cars of other carriers was called to the Commission's attention in three cases only. The Commission's report remarks upon those cases as follows:

> Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge,

> and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials. (R. 116.)

The decision in the *Tap Line cases* turned upon the Commission's view that the particular roads were plant facilities rather than industrial common carriers, and in the *Five Per Cent case* the lawfulness of the practice was not in issue. So that it is true that these cases can not be claimed by the Commission as squarely holding the practice to be unlawful, for the precise conditions were not presented and passed upon. But it is that very

thing that makes the rule of statutory construction invoked by petitioners inapplicable to this case.

The principle of statutory construction, whereby the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, obviously can not be loosely applied. In the first place, there is no room for the application of any such principle where the language is plain and unambiguous. Appellants are not claiming that their cars are not property transported for their benefit, and, apparently, they are not relying overmuch on the exception in the Act, which permits of passes for specified individuals. Secondly, unless the administrative body has ruled precisely as to the proper interpretation to be given an ambiguous statute, it is obvious that Congress can not be said to have adopted such interpretation by reenactment of the statute. That is, even assuming ambiguity in the statute under consideration, Congress can not be said to have adopted an ambiguous interpretation to cure such ambiguity in its legislation. Having in mind the informal manner in which the form of pass was prescribed by the Commission, the character of the statutory authority under which it acted and the uncertainty as to what it did mean, the Commission's action in this particular can not be regarded as its considered and precise interpretation of the statute. In the *Tap Line Cases* the Commission

condemned the use of "car passes" by individual carriers, and in the *Five Per Cent Case* it referred to revenue which the carriers might have secured by exacting charges for transportation of private cars. All that can be said of those cases is that the Commission failed to interpret the statute and declare the general practice of transporting free the cars of other carriers unlawful.

In *United States* v. *Mo. Pac. R. R. Co.*, 278 U. S. 269, involving paragraph (4) of section 15 of the Act, which restricts the Commission from requiring carriers to join in through routes that exclude their long hauls, the Commission construed the paragraph as only protecting the long hauls of originating carriers, or carriers in possession of the traffic. This construction followed the interpretation given to the paragraph by a long line of decisions of the Commission involving somewhat similar situations. The Court did not consider that the precise conditions were involved in those cases. In holding that Congress could not be said to have adopted the interpretation contended for the Court said at pages 279–280:

> And appellants assert that the Commission in a long line of decisions has held that the rule declared in paragraph (4) applies only to traffic in possession of the carriers, and they argue that this construction was impliedly sanctioned by the inclusion of the provision without alteration in Transportation Act, 1920. But the rule that reenactment of a statute after it has been construed

by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. *New Haven R. R.* v. *Interstate Commerce Comm'n.*, 200 U. S. 361, 401. The rule has no application in this case because, the decisions by the Commission do not show that it had given paragraph (4) the limited effect claimed by appellants; the order here involved conflicts with that provision; and, if any prior decision of the Commission held that the Act empowered it to establish a through route substantially like the one under consideration, that construction was plainly erroneous and did not attach to or become a part of the provision re-enacted.

In *American Express Co.* v. *United States*, 212 U. S. 522, there was involved the question as to whether the provisions of the Act permitting carriers to grant passes to their own officials and employees, and interchange passes to the officials and employees of other carriers embraced permission to grant franks for free transportation of property to such officials and their employees. The court held that the pass provisions of the Act could not be construed to include the transportation of goods, and this despite the fact that it was contended that the custom of issuing franks was of long standing and presumably known to Congress; that there was no record of any protest against it by the Commission, nor any suggestion in any

speech in Congress that it was supposed to be detrimental to the public interest or intended to be prohibited.

In the instant situation it can not be asserted that rights or interests of substantial kind have been assumed in reliance upon the alleged administrative interpretation, which fact is in sharp contrast with the situation in *Logan* v. *Davis*, 233 U. S. 627, one of the outstanding decisions relating to the weight to be given to an interpretation given to an ambiguous statute by the body charged with its administration. In that case this court said at page 627:

> * * * Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

Appellants in the companion case called attention to the fact that the Commission decision in the

Five Per Cent Case was reported to Congress in its Annual Report. But there was no issue as to the unlawfulness of the carriers' practices in that case and the most that can be said of the decision is that the Commission failed to declare the practice unlawful. If the Commission's oversight to take steps to stop every violation of the Act, which study of the vast volume of tariffs and other records on file with it might disclose, or its failure to take steps to stop every practice, perhaps known to it in a general way but not squarely brought to its attention as a violation of the Act, should be regarded as interpretations sanctioning such violations of law, and the subsequent reenactment of the act by Congress as an adoption of such interpretations, the Interstate Commerce Act would present a mass of provisions as to which the ordinary meaning of words would afford no guide to their proper interpretation and legal meaning.

Furthermore, the Commission's order rests both upon its conclusion that the carriers' practice violates the statutory prohibitions in section 6 and upon its administrative findings that the practice results in unjust discrimination and undue prejudice in violation of sections 2 and 3. Viewed from the administrative standpoint, the most that can be urged by virtue of the inclusion of the word "car" in the pass form prescribed is that it was the then judgment of the Commission that the practice did not result in unjust discrimination.

The Commission's failure to prosecute and its alleged past rulings in respect of a former pass can not be urged as in any way restricting its present judgment upon administrative questions. If this were not true, once the Commission has found certain practices reasonable and nondiscriminatory, it would thereafter be foreclosed from prescribing any different practices. As said in *Virginian Ry.* v. *U. S.*, 272 U. S. 658, at pp. 665, 666:

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1930.

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Appellants,
v.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Western District of Missouri.

[February 25, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought to set aside two orders of the Interstate Commerce Commission of November 4, 1929, and July 30, 1929, respectively (155 I. C. C. 775), relating to the transportation by carriers subject to the Interstate Commerce Act of private passenger-train cars, including so-called office cars, of other carriers free or at other than published tariff rates. The orders are the same as those under review in *Louisville & Nashville Railroad Company* v. *United States*, decided this day. 282 U. S. —. Treating the two orders, which deal with the same subject matter, as substantially one requirement, the appellants challenge it "so far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad." They also object to so much of the order as purports to regulate movements which are strictly intrastate. The District Court, constituted as required by statute, sustained the orders of the Commission and dismissed the petition.

This suit in the District Court for the Western District of Missouri was begun in February, 1930, sometime after the suit of the *Louisville & Nashville Railroad Company, supra*, assailing the same orders, was brought in the District Court for the Western

District of Kentucky. The petitioners in both suits were parties to the proceeding in which the orders of the Commission were made. The United States and the Interstate Commerce Commission made no reference in their answers in the present case to the pendency of the earlier suit, but after decree in that suit the Commission amended its answer herein, setting up that decision as an affirmative defense. The defense was that the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219-221; U. S. C. Tit. 28, secs. 43-47) which transferred to the several District Courts the jurisdiction to enjoin orders of the Commission, a jurisdiction formerly vested in the Commerce Court, was not intended to create conflicting jurisdictions among the several District Courts and, after the jurisdiction of one District Court had been unsuccessfully invoked to enjoin an order of the Commission, to permit the jurisdiction of another District Court subsequently invoked to be exercised for a similar purpose.

It is unnecessary to review the history of the legislation authorizing suits to be brought to set aside orders of the Interstate Commerce Commission. The effect of the Urgent Deficiencies Act was to redistribute the jurisdiction of the Commerce Court. *Vicksburg, Shreveport & Pacific Railway Company* v. *Anderson-Tully Company*, 256 U. S. 408, 414. The venue provisions of the Urgent Deficiencies Act (U. S. C., Tit. 28, sec. 43) are as follows:

"The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

We find no provision of the applicable statutes which deprives a District Court of jurisdiction of a suit brought by a party entitled to attack an order of the Interstate Commerce Commission in accordance with these provisions as to venue. But the existence

of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court. Compare *Langnes* v. *Green*, decided this day, 282 U. S. —. The appellants, upon proper application, could have been allowed to intervene in the earlier suit brought for the same purpose in the District Court for the Western District of Kentucky (U. S. C., Tit. 28, sec. 45a) and could have presented there all of their grounds of attack upon the orders in question. The orders of the Interstate Commerce Commission may apply throughout the country, and there may be cases where the convenience of the parties and the interests of justice may make appropriate separate suits by different parties affected by the same order. The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason. As, however, the defendants here did not raise the question of the pendency of the earlier suit until the day of final hearing, several months after the suit was begun, we see no reason for disturbing the action of the District Court in this respect.

Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act. *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U. S. 177, 188; *Terminal Taxicab Company* v. *Public Utilities Commission*, 241 U. S. 252. But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation. This applies to its transactions with other carriers. See *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 391, 392; *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company*, 225 U. S. 326, 341, 342. Upon grounds which have been

stated in the opinion of the Court in the *Louisville & Nashville* case, *supra*, we have concluded that, in view of the facts found by the Commission, the transportation of the cars in question falls within the provisions of the Interstate Commerce Act, and that the order of the Commission in directing the carriers to cease and desist from transporting such cars free or at less than published transportation rates was within its authority.

With respect to the contention that the Commission's order undertakes to regulate movements of office cars in intrastate commerce, it is enough to say that no such complaint was made in the petition in this suit. The Commission's order is construed as intended to apply to transportation within the purview of the Interstate Commerce Act, and no different application of it is disclosed by the record.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.